UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2011] UKUT 366 (LC)
UTLC Case Number: LRX/136/2009

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – communal heating system – renewal of equipment in tenants' flats – whether cost of replacement falls within landlord's responsibility – whether cost properly included in service charge – construction of leases – method of calculating service charge – reasonableness of service charge – Landlord and Tenant Act 1985 s19 – appeal dismissed

IN THE MATTER OF AN APPEAL FROM A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

BETWEEN	**(1) DAVID LEVITT** **(2) JENNY LEVITT**	**Appellants**
	and	
	LONDON BOROUGH OF CAMDEN	**Respondent**

Re: 170 O'Donnell Court,
Brunswick Centre,
London,
WC1N 1NZ

Before: Her Honour Judge Walden-Smith

Decision on Written Representation

The following cases are referred to in this decision:
Kenniston House [2010] UKUT 194(LC)
R (Khatum) v Newham LBC [2005] QB 37
Director General of Fair Trading v First National Bank plc [2001] UKHL 52
Pole Properties v Feinberg [1981] 43 P & CR 121
Focelux v Sweetman [2001] 2 EGLR 173
Veena SA v Cheong [2003] 1 EGLR 175
Finchbourne v Rodriquez [1976] 3 All ER 581
Morgan v Stainer [1993] 2 EGLR 73
Scottish Mutual Insurance Co v Jardine (1999) ECGS 43
Schilling and Ors v Canary Riverside Development PTD Limited LRX/26/2005

DECISION

Introduction

1. This is an appeal pursuant to the provisions of section 175(2) of the Commonhold and Leasehold Reform Act 2002 from the decision of the Leasehold Valuation Tribunal given on 15 September 2009. It relates to service charge obligations with respect to major works undertaken at the Brunswick Centre, London WC1N 1NA. The LVT determined that the service charge demand made on 23 April 2007 was invalid. That decision would not prevent the landlord from properly certificating the costs of the work incurred and seeking recovery of the appropriate proportion from the tenants in due course, once proper accounts and demands had been served. As a consequence, both parties were concerned that the LVT proceeded to determine the substantive issues with respect to the liability of the tenants to pay, as part of the service charge, a proportion of the cost of installing heating and hot water systems within individual flats.

2. The LVT held, among other things, that the tenants are obliged to contribute in respect of the major works and, in particular, to contribute in respect of the cost of works to the interior of individual flats at the Brunswick Centre. The LVT refused permission to appeal on this issue and on 24 November 2009 His Honour Judge Reid QC granted permission to appeal with the following observation:

> "The construction placed on the lease at paragraphs 34-40 of the LVT decision is clearly correct. So far as the allocation of costs is concerned prima facie the appropriate apportionment is on a rateable value basis. Prima facie the landlord had no obligation to specify some other method under paragraph 4.3 of the Fourth Schedule because the tenants had chosen to have installations of their own which meant that they no longer took advantage of the services provided: the contrary however is capable of argument and since the decision will have long term effects the appeal should be allowed to proceed on this point."

The Appellants state that it is their understanding that permission to appeal has been granted both with respect to the liability to contribute by way of service charge to the proposed works and to the allocation and reasonableness of the service charge. The Respondent contends that this is not the case and relies upon the observation of His Honour Judge Reid QC that the construction of the Lease expressed by the LVT in paragraphs 34 – 40 of its decision was clearly correct.

3. This is an appeal by way of review made on written representations. Nicola Allsop instructed by John May Law acts on behalf of the Appellants, Katharine Holland QC is instructed by Legal Services of the London Borough of Camden, the Respondent. While the observation of His Honour Judge Reid QC, that there is potential for argument, appears to relate solely to the issue of the allocation of costs, in light of the arguments raised on the papers (including comment by the parties upon the decision of the President in the Kennistoun House case, neutral citation number [2010] UKUT 194 (LC)) it seems to me appropriate at this stage to deal with both limbs of the appeal. It is therefore necessary to

consider both the issue as to whether the cost of replacing the heating system in each individual flat falls within the responsibility of the landlord and the issue as to whether the landlord applied the correct method of calculating the service charge and whether that service charge is reasonable.

The Parties

4. The Appellants, Mr David Levitt and Mrs Jenny Levitt, are the long leasehold owners of the property at 170 O'Donnell Court, Brunswick Centre, Bloomsbury, London WC1N 1NZ ("170 O'Donnell Court) pursuant to a Right to Buy Lease granted for a term of 99 years, less 5 days, from 18 December 2000. Mr and Mrs Levitt purchased the Lease in or about April 2005. The Respondent, the London Borough of Camden holds a headlease of the Brunswick Centre.

The Property

5. 170 O'Donnell Court is one of 394 residential flats at the Brunswick Centre. The Brunswick Centre was constructed in or about 1970s on behalf of the London Borough of Camden and comprises a large shopping complex around a central open area with shops, restaurants and a cinema, together with two large residential units to the east and west which rake back as they rise upwards. 81 of the 394 flats are held on long leases. The remainder (some 313 flats) provide secure accommodation for the tenants of the London Borough of Camden. The Brunswick Centre is now Grade II listed.

The Heating System

6. The majority of the flats, including 170 O'Donnell Court, were heated by way of a mechanical warm air re-circulation system. A large boiler, originally located in an adjacent hotel and, from the late 1990s, in the basement of the Brunswick Centre, provided hot water to heat both residential blocks. The water was pumped around the residential units under pressure and a heat exchanger in each individual flat enabled the resident to convert some of the heat from the communal system into hot air which then heated each individual flat.

7. By 2005, or thereabouts, the heating system was coming to the end of its useful life. The pipework was original, save for some basement locations, and being more than 30 years old, was beyond its normal life expectancy. As a result of corrosion and the consequences of a possible leak, the system temperature and pressure were both reduced to prevent the possibility of scalding being caused to occupants. This reduction in temperature and pressure in turn resulted in a significant reduction in available heating capacity and the ability of the system to transfer heat effectively. The London Borough of Camden determined that a new means of providing heat to the flats was due and that for safety and reliability reasons the system should be replaced.

170 O'Donnell Court

8. Mr and Mrs Levitt contend that when they purchased 170 O'Donnell Court in or about April 2005, it was uninhabitable. They contend that, in addition to blockages to drainage caused by the previous occupants, the heating system was unable to provide any service to 170 O'Donnell Court. This is not accepted by the London Borough of Camden. Mr and Mrs Levitt accept that they did not request the London Borough of Camden to undertake repairs to the heating system at that time and there are two letters in the papers before me, dated 26 April 2005 and 9 May 2005, when Mr Levitt (who was involved both in the original design of the Brunswick Centre and the subsequent improvements in the heating system) sets out his intention to replace the existing heating installation with a conventional wet radiator system in such a way that when the existing community heating mains was replaced and installed in 170 O'Donnell Court the new heat exchanger could be connected to the new community heating mains with little disruption to either the heating system itself or the decorations. Consent from the London Borough of Camden, required under the terms of the lease, was sought by Mr and Mrs Levitt but not in fact given for them to carry out those works. The works were carried out at the expense of Mr and Mrs Levitt and it is clear from my reading of the correspondence that they never intended to be reimbursed for their expenditure by the London Borough of Camden. A primary factor in their deciding to have the works carried out at that time appears to have been concern that if they waited for the London Borough of Camden to carry out their planned improvements to the heating system, then that would have caused major disruption to the decorations in the flat.

9. It is Mr and Mrs Levitt's case that 170 O'Donnell Court benefited for some time from its own independent heating system and that once the communal system was replaced in 2007/2008 it was connected to the new communal system. The work carried out by Mr and Mrs Levitt was, in due course, approved by the London Borough of Camden.

The Service Charge Demand

10. The London Borough of Camden demanded payment on account of the works to replace the heating system on 23 April 2007. Mr and Mrs Levitt's share of the works was calculated by the London Borough of Camden to be £14,142.63, which sum represented both the cost of replacing the heating system in the communal areas and in each of the flats. Mr and Mrs Levitt have always accepted an obligation to pay for the replacement of the heating system in the communal areas. They deny liability to contribute the costs of installing the heating system in the other flats as they did not seek or receive any payment to meet the cost of the system installed by them in their own flat. The London Borough of Camden has never submitted a demand simply for the costs of the replacement of the heating system in the communal areas as it has always been the contention of the landlord that, in accordance with the terms of the lease, the obligation is to pay service charge both for the communal areas and in each of the flats.

The Lease

11. As stated above, the lease of 170 O'Donnell Court is a Right to Buy Lease, created on 18 December 2000 for a term of 99 years, less 5 days ("the Lease"). The demise, as set out in clause 2, is of the Premises which are defined as all that fifth floor flat number 170 O'Donnell Court, Brunswick Centre shown edged red on the plan annexed to the Lease together with such garden area (if any) and in the First Schedule as including "the surface of the floors above the joists or other structure and the surface of the floor of the balcony (if any) and the ceiling of the Flat up to but excluding the joists or other supporting floor structure …(but including …all wires pipes cables conduits sewers and other conducting media serving exclusively the Flat) …" . The "Block" is defined as the building or part of the building in which the Flat is situated together with any other building or buildings on the Estate which are physically linked for the purpose of the provision of services. The "Estate" is defined as being the property known as the Brunswick Centre Estate.

12. By clause 3.2.1 of the lease the tenant covenants to pay the landlord on demand by way of further additional rent the Service Cost, subject to restrictions contained in 3.2.2 and 3.2.3. Those restrictions do not apply in this matter. "Service Cost" is defined in clause 1.1 as the amount payable by the tenant as the Specified Proportion of the Service Charge; and "Service Charge" is defined

> "As all those reasonable costs overheads and expenses and outgoings incurred or to be incurred by the Landlord in connection with
>
> (a) the management and maintenance of the Estate
>
> (b) the carrying out of the Landlords obligations and duties and providing all such services as are required or appropriate to be provided by the Landlord under the terms of the Lease and:
>
> (c) the repair and maintenance, renewal, decoration, insurance and management of the Block including all such matters set out in the Fifth Schedule." By clause 3.10.1 the tenant is obliged to keep the flat and everything demised therein including the landlord's fixtures and fittings installed in or affixed to the flat well and substantially repaired.

13. By clause 3.10.1 the tenant covenants

> "Throughout the Term and from time to time and at all times to keep the Flat and everything demised therein and the Landlord's fixture and fittings sanitary apparatus and appurtenance installed in or affixed to the Flat and the window glass thereof (but excluding any portion thereof which the Landlord covenants herein to repair) with all necessary reparations cleansing and amendments whatsoever well and substantially repaired cleansed maintained and renewed …"

14. By clause 4.2 the landlord covenants "to maintain repair redecorate renew and amend clean repoint paint grain varnish whiten and colour, as applicable," items which are then recited including, at 4.2.2 "the sewers drains channels watercourse gas and water pipes

electric cables television aerials and wires and supply lines and all other connecting media in under and upon the Block save and except where such items exclusively serve the Flat" and 4.2.3 "the boilers and heating and hot water apparatus (if any) in the Block save and except such items (if any) as may be now or hereafter installed in the Flat serving exclusively the Flat and not comprising part of a general heating system serving the Block". I will return to these sub-clauses. Clause 4.4 provides that the landlord covenants to supply hot water for domestic purposes to the Flat by means of the boiler and heating installations serving the Block and also from 1st October to the 30th April inclusive in each year to supply hot water for heating to the radiator fixed in the Flat so as to maintain a reasonable and normal temperature.

15. The Fourth Schedule provides three methods for the calculation of the service charge as set out in paragraph 4 therein. The annual amount of the Service Cost, which is defined as "the amount payable by the Tenant being the Specified Proportion of the Service Charge" is to be calculated either by:

> 4.1 dividing the aggregate of the expenses and outgoings incurred in respect of the Items of Expenditure by the Landlord in the Specified Annual Period to which the certificate relates by the aggregate of the rateable values (in force at the end of such period) of all the premises within the Block and then multiplying the resultant amount by the rateable value (in force at the 31st March 1989) of the Premises PROVIDED ALWAYS that in the event of the abolition or disuse of the rateable value system for properties the references to rateable values herein shall be substituted by a reference to the floor areas of all the premises in the Block or on the Estate (where applicable) and apportioned accordingly or
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> 4.2 in the case of those items for which the Landlord's expenses extend to the Estate or other Estates then a fair and reasonable proportion of the costs thereof attributable to the Premises such proportion to be determined by the Landlord's Finance Officer whose decision shall be final and binding or
>
> 4.3 such other method as the Landlord shall specify acting fairly and reasonably in the circumstances and from time to time and at any time (including but without prejudice to the generality thereof any combination of methods.

16. The Fifth Schedule (Items of Expenditure) includes the following: under paragraph 1 "the expenses of maintaining repairing redecorating and renewing (or replacing as appropriate) amending … the Block and all parts thereof including all the appurtenances apparatus and other things thereto belonging including those items included in clauses 4.2 and 4.3", and under paragraph 2 for "the cost of periodically inspecting maintaining overhauling repairing and where necessary replacing the whole of the heating and domestic hot water systems and gas electricity and water pipes and cables serving the Block and the lifts lift shafts and machinery therein (if any)".

The Issues

17. In light of my determination that both limbs of the appeal ought to be dealt with, the matters to be reviewed are:

(i) Whether the landlord is responsible for the cost of replacing the heating system in each individual flat pursuant to the provisions of the Lease;

(ii) Whether the landlord used the correct method of calculating the service charge under the provisions of the Lease and whether the service charge resulting from that calculation is reasonable.

The Landlord's Responsibility

18. In accordance with the terms of the Lease, the London Borough of Camden, as landlord, is entitled to include in its service charge all those reasonable costs etc of carrying out its obligations in connection with the management and maintenance of the Estate, the carrying out of the obligations and duties of the landlord and repair and maintenance etc of the Block, including all such matters set out in the Fifth Schedule (see the definition of "Service Charge" for the full wording). Paragraph 1 of the Fifth Schedule includes the expenses of maintaining, repairing, redecorating and renewing (or replacing as appropriate) all the appurtenances apparatus and other things thereto belonging including those items described in clause 4.2 and 4.3. Paragraph 2 of the Fifth Schedule expressly refers to the cost of maintaining overhauling and repairing and where necessary replacing the whole of the heating and domestic hot water systems serving the Block. There is no dispute between the parties but that the heating system was in need of replacement by 2005.

19. The extent of the landlord's responsibility with respect to the boilers and heating and hot water apparatus is, in my judgment, to be found in an analysis of the wording contained in sub-clause 4.2.2 and sub-clause 4.2.3.

20. Sub-clause 4.2.2 provides that the landlord has responsibility for the sewers drains channels watercourses gas and waterpipes etc and all other conducting media in under and upon the Block "save and except where such items exclusively serve the Flat." In distinction to that, sub-clause 4.2.3 provides that the landlord has responsibility for the boilers and heating and hot water apparatus (if any) in the Block "save and except such items (if any) as may now or hereafter installed in the Flat serving exclusively the flat and not comprising part of a general heating system serving the Block." These final words "and not comprising part of a general heating system serving the Block" must, in my judgment, be considered to have a purpose. They are not mere surplusage. That view is supported by the distinct difference in the wording between clause 4.2.2 and clause 4.2.3. If the intention had been to exclude from the landlord's obligations any components of the heating system that exclusively served the flat, then there would have been no requirement for the additional words. As a consequence, in order for the landlord not to have responsibility for the heating system within the flat, the heating and hot water apparatus installed in the flat must not only exclusively serve the flat but it must also not be part of a general heating system serving the block. Parts

of the heating system which exclusively serve the flat may also form part of a general system that serves the Block. If that is the case then the landlord has responsibility for those parts of the heating system. If parts of the heating system both exclusively serve the flat and are not part of a general system that serves the Block then the landlord is not responsible.

21. In this matter, it is accepted between the parties that the LVT accurately recorded both the old and new systems of heating in the block in paragraphs 12 to 17 of its decision. The new system involves water at 125 degrees centigrade being pumped at pressure around a closed system. Within each flat there is an input and output pipe from the communal system and just inside each flat is an isolating valve so that, if necessary, an engineer can turn off the supply of pressurised hot water from the communal system to an individual flat. The input pipe pumps super-hot water into tubes in a cylinder filled with water so that the heat from the communal system is transferred to the water in the cylinder and in turn the water which has been heated in the cylinder is used to run a radiator system in the individual flats and also to provide hot water. With respect to 170 O'Donnell Court, Mrs and Mrs Levitt removed the existing air heating system and heat exchanger and installed radiators and new piping. The radiators were heated by a cylinder which worked off an immersion heater which also provided hot water. The works carried out by Mr and Mrs Levitt were carried out without the prior permission of the London Borough of Camden, contrary to the terms of the Lease. The system to 170 O'Donnell Court became wholly independent of the communal system but when the communal system was replaced, Mr and Mrs Levitt had themselves reconnected to it so that there are input and output pipes connected to a cylinder which is warmed from the heat of the communal system and an isolating valve to allow the system to be shut off as in the other flats. The immersion heater has been retained as a back up. The heating in 170 O'Donnell Court therefore comes from the communal system.

22. The Appellants point to the fact that there is an isolating valve just inside each flat, which is capable of isolating any particular flat from the communal system without comprising the system serving the other flats, as supporting the contention that the heating system within each flat is not part of the "general heating system". I do not agree with that contention. While the isolating valve enables a flat to be isolated from the communal system, that does not stop the cylinders, radiators and pipes within the flat being part of the general heating system. There is a single heating system serving the whole of the building. The cylinders, radiators and pipes within the flat serve that individual flat but still form part of the general heating system serving the whole of the building

23. The Appellants further point to the fact that, prior to the overhaul of the communal heating system, they carried out their own works which meant that heating was provided entirely independently of the communal heating system prior to the system at 170 O'Donnell Court being "hooked up" to the communal system. The heating system within 170 O'Donnell Court and in the other flats in the block are the means by which the flats make use of the "general heating system". As I understand the situation, a few flats have disconnected themselves from the communal system and have provided their own independent facilities. These flats have not been asked to contribute to the costs of the replacement general heating system but the difference is that they have not linked themselves to that system in any way and instead have heating by way of electric heaters or oil filled radiators.

24. The Appellants have further raised the prospect that the construction given by the LVT that the radiators, cylinders and pipes within the flats form part of the general heating system gives rise to obligations which could not have been the intention of the parties when the Lease was drafted. I do not accept this proposition. The Lease terms should be given their ordinary and natural construction. The landlord would understandably be concerned to have control over the maintenance and renewal of all parts of the heating system, including the radiators, cylinders and pipes in individual flats. The obligation to maintain repair and redecorate etc is to be performed and observed "as applicable".

25. I have considered the decision of the President in the Kennistoun House case dated 17 June 2010 and to the joint statement provided on behalf of both parties upon the President's invitation to comment. It is accepted by both parties that the terms of the lease in that case are not materially different from the terms of the Lease in this case but that the two cases can be factually distinguished. Having carefully considered that decision, the joint statement and the factual differences highlighted I consider the decision in this case is the same.

26. It is my conclusion that the landlord's responsibilities in this matter extend to the pipework, cylinders and radiators located on the flat-side of the isolation valve and that the construction placed upon the lease by the LVT is the correct construction. This first limb of the appeal is therefore dismissed.

The Apportionment and Reasonableness of the Service Charge

Apportionment

27. As is set out above, paragraph 4 to the Fourth Schedule of the Lease sets out the alternative methods for the calculation of the specified proportion of the Service Cost payable by the tenant. Paragraph 4.3 permits the landlord to use "such other method as the Landlord shall specify acting fairly and reasonably in the circumstances and from time to time and at any time (including but without prejudice to the generality thereof any combination of methods)" in calculating the specified proportion of the Service Cost payable by the tenant.

28. It is the Appellants contention that the LVT erred in finding (or appearing to find) that the landlord was only to use "such other method" as set out in paragraph 4.3 in exceptional cases. In my judgment, the method set out in paragraph 4.3 is not simply to be used in exceptional circumstances. On a proper construction of the Lease no one method is given supremacy over the others. The landlord is to calculate the Specified Proportion of the Service Cost payable by the tenant of an individual flat by one of the methods set out in paragraph 4 of the Fourth Schedule. In my judgment, the three methods set out are alternatives to each other. The landlord's obligation is to apportion by one of the methods set out, acting fairly and reasonably in the circumstances. There is not, either on a proper construction of the Lease or on the basis that there is an implied term to the same effect (either to give business efficacy or as an obvious but unexpressed intention of the parties) a requirement on the part of the landlord to adopt the most reasonable approach for calculating the service charge in any given case.

29. The Appellants have also sought to rely upon the Unfair Terms in Consumer Contract Regulations 1999 ("the Regulations") as giving rise to an interpretation that the landlord is bound to accept the most reasonable approach for calculating the service charge in any given case. *R (Khatum) v Newham LBC* [2005] QB 37 provides that the Regulations do apply to contracts in respect of land. This was not a point raised before the LVT and there is therefore an issue as to whether it can properly be raised in this appeal which is by way of review. However I do not consider it assists the Appellants in any event. In my judgment, Mr and Mrs Levitt were consumers within the requirements of the Regulations in purchasing the lease of 170 O'Donnell Court. It is said on behalf of the landlord, and I have seen a newspaper cutting which gives some support to this, that Mr Levitt is an architect and a co-founder and ex-director of the architectural firm Levitt Bernstone who were appointed as the consultants on the works contract for the general heating system. It also appears that Mr Levitt was involved in the original design and/or development of the Brunswick Centre. These matters do not, in my judgement, take him outside the definition of a consumer, namely a natural person acting outside his trade, business or profession in the purchase of this Lease and entering into these Lease terms. Further, Mr Levitt was acting with his wife in the purchase of the lease and in the decision to carry out the works to the heating system at 170 O' Donnell Court. Consequently, the Regulations are applicable but I do not consider the provisions for the apportionment of the Service Costs between the tenants is unfair having considered the criteria set out in the speeches of both Lord Bingham and Lord Steyn in *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52 and the useful guidance from the editors of Chitty on Contracts (particularly paragraphs 15-045 to 15-067). The provisions are not unfair as they are not "contrary to the requirements of good faith … cause[ing] a significant imbalance in the parties' rights and obligations to the detriment of the consumer".

30. The Appellants further rely upon the decision in *Pole Properties v Feinberg* [1981] 43 P & CR 121. In that case, the lease required the tenant to contribute to heating costs in a particular proportion. During the tenancy the landlord had changed the heating system in such a way as to improve the heating to other flats in the newly enlarged building, but not to the tenant's flat. The Court of Appeal held that given the radical change in circumstances this meant that the lease, as originally understood by the parties, was no longer of any application and that it was appropriate therefore to impose a charge which was fair and reasonable in all the circumstances. The Appellants contend that the argument is more compelling in the present case because there is no necessity for a method to be formulated for the calculation of the apportionment of the service charge as an appropriate method is already provided for in the Lease. The circumstances in *Pole v Feinberg* were considerably different to the circumstances of the present case. Here, the tenants made a conscious decision to carry out their own works within 170 O'Donnell Court prior to the works being carried out by the landlord as they did not want their own works of refurbishment and decoration to be damaged once those communal works were undertaken. That work was undertaken without the express approval of the landlord but resulted in a reduction to the overall cost of the contract and therefore a proportionate reduction in the Service Cost contribution to be made by each leaseholder, including the Appellant.

31. Having already come to the conclusion that the landlord's responsibilities in this matter extend to the pipework, cylinders and radiators located on the flat-side of the isolation valve and that the landlord is therefore entitled to recover the costs of that work as it is part of the

communal heating system; in my judgment the apportionment of the Service Cost attributable to the Appellants, by reference to rateable value, as set out in paragraph 4.1 of the Fourth Schedule, was reasonable. The landlord was not obliged to apply the method set out in paragraph 4.3 of the Fourth Schedule, namely "such method as the Landlord shall specify acting fairly and reasonably in the circumstances and from time to time and at any time" and it was fair and reasonable for the landlord to apportion the Service Cost between the tenants based upon the method of calculation set out in paragraph 4.1 of the Fourth Schedule.

Reasonableness

32. The Appellants further contend that the Leasehold Valuation Tribunal failed to properly consider whether the service charge demanded was reasonable and that if the issue had been considered by the tribunal then it would have been bound to find that the sum sought by the landlord pursuant to the provisions of paragraph 4 of the Fourth Schedule was not reasonable.

33. It is clear from the face of the decision of the LVT that the tribunal had in mind the relevant statutory provisions of the Landlord and Tenant Act 1985, as amended by the Housing Act 1996 and the Commonhold and Leasehold Reform Act 2002, having set those out at the commencement of the decision. The contents of the decision, in particular paragraphs 46 to 49, set out the reasoning of the LVT. Section 19(1)(a) of the LTA 1985 sets out relevant costs should be taken into account in determining the amount of a service charge payable for a period only to the extent that they are reasonably incurred and that the works are of a reasonable standard, and the amount payable shall be limited accordingly.

34. *Forcelux v Sweetman* [2001] 2 EGLR 173 and *Veena SA v Cheong* [2003] 1 EGLR 175 both make it clear that the requirement of section 19(1) of the LTA 1985 is that what actually needs to be scrutinised is whether the costs have been "reasonably incurred". The landlord is only entitled to recover costs and outgoings that are fair and reasonable, both with respect to their quantum but also with respect to their nature:

> "…the parties cannot have intended that the landlords should have an unfettered discretion to adopt the highest conceivable standard" per Cairns LJ in *Finchbourne v Rodriquez* [1976] 3 All ER 581, 587b
>
> See, also, David Neuberger QC (as he then was) in *Morgan v Stainer* [1993] 2 EGLR 73.

35. The Appellants contend that it is not reasonable to oblige them to contribute to the cost of carrying out replacement works to the heating systems of each of the other flats when they have at their own expense paid for the cost of those equivalent works to their own Flat. The test of reasonableness is considered on the facts of each case. *Scottish Mutual Insurance Co v Jardine* (1999) ECGS 43, relied upon by the Appellants, is an example of a case where works undertaken by the landlord, although reasonable in themselves, could not reasonably be charged to the tenant in view of the fact that the remaining period of the tenant's occupation was limited and the tenant would therefore derive limited benefit from the works:

> "… vis a vis the Defendant, the totality of the amounts expended by the Plaintiff on the works to the roof was not "reasonably and properly expended or incurred" because these works went significantly beyond what was required for the performance of the Plaintiff's obligations to the Defendant in respect of the condition of the premises, because considerable monies had been very recently expended upon short-term repairs and there was no evidence that these had been ineffective and because there was no evidence of any continuing leakage and there was therefore no pressing need to commence long-term repairs prior to the end of the Defendant's term (which end was imminent)".

The circumstances in this case are entirely different. Mr and Mrs Levitt purchased the lease of 170 O'Donnell Court with knowledge (actual or imputed) that works to the communal heating system were to be undertaken in the near future by the landlord as the same was, so I am informed, set out in the pre-assignment information and the Appellant has not sought to contravene that statement made on behalf of the Respondent. The Appellants state that they were not alone in resorting to self-help in providing their own heating system. However, it appears that the other flat owners who did resort to self-help did so by disconnecting themselves from the communal system and by relying on "stand-alone" systems.

36. It was not, in my judgment, unreasonable in the circumstances of this matter for the Appellants to be responsible for their proportion of the Service Cost, as apportioned in accordance with paragraph 4 of the Fourth Schedule. Section 19 does not permit the tribunal to ascertain what is a reasonable apportionment of the relevant costs. "Costs are to be taken into account "only to the extent that they are reasonably incurred", but if reasonably incurred they fall to be apportioned in accordance with the terms of the lease, except if excluded by a failure to consult or otherwise under for example ss. 20B and 20C" per HH Judge Rich sitting in the Lands Tribunal in *Schilling and Ors v Canary Riverside Development PTD Limited* LRX/26/2005. The costs of replacing the communal heating system, including the radiators, pipes and cylinders flat-side of the valve, were, in my judgment, reasonably incurred in accordance with the protection given by section 19(1) of the LTA 1985 (as amended) and, having given credit for the savings in the overall contract created by reason of the Appellants having undertaken their own works to the flat.

Conclusion

37. It is my conclusion that:

(1) The landlord's responsibilities extend to the pipework, cylinders and radiators located on the flat-side of the isolation valve;

(2) It was fair and reasonable for the landlord to apportion the Service Cost based upon the method of calculation set out in paragraph 4.1 of the Fourth Schedule;

(3) It was not unreasonable for the Appellants to pay towards the costs of the work to the other flats.

38. The appeal against the decision of the LVT therefore fails.

Dated 21 September 2011

Her Honour Judge Walden-Smith